IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 2, 2008 Session

STATE EX REL. RHONDA F. CORRELL v. RONALD D. CORRELL, JR.

Appeal from the General Sessions Court for Blount County
No. S-2775 William R. Brewer, Jr., Judge

No. E2008-00845-COA-R3-CV - FILED JANUARY 29, 2009

Rhonda F. Correll ("Wife"), through the State of Tennessee, filed a petition for contempt against her former spouse, Ronald D. Correll, Jr. ("Husband"), for failing to make ordered child support payments. The court awarded Wife a child support arrearage of $16,496.20 as of February 25, 2008. The court also found Husband in civil contempt and ordered him jailed until he purged himself of contempt by making a payment of approximately $2,000 by noon on March 18, 2008. Husband appeals. We vacate the order finding Husband in contempt. Our action is based upon the failure of the trial court to make factual findings as to (1) whether Husband had *willfully* failed to pay support and (2) whether, at the time Husband was ordered incarcerated, he had the present ability to pay the purge amount of approximately $2,000. We also remand for a determination by the trial court as to whether Husband's petition to modify his child support obligation should be granted. In addition, we hold that, because there was no timely objection in the trial court to the admission of a Social Security Administration decision ("the SSA decision") finding that Husband was not disabled within the meaning of the Social Security Act, the trial court did not err in utilizing the SSA decision in reaching its own decision.

Tenn. R. App. 3 Appeal as of Right; Judgment of the General Sessions Court Vacated in Part and Affirmed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Lance A. Evans, Maryville, Tennessee, for the appellant, Ronald D. Correll, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter, Warren Jasper, Senior Counsel, General Civil Division, Nashville, Tennessee, for the appellee, State of Tennessee ex rel. Rhonda F. Correll.

OPINION

I.

In this appeal, there is no verbatim transcript of the hearing by the trial court, at which the decisions under appeal were made. In lieu of such a transcript, a statement of evidence was filed.

Over a period of some four years there have been at least 15 scheduled court appearances in this matter. Husband claims that he is disabled and unable to work. In his brief, he says: "Dr. Nash and Dr. Reid, Pellissippi Primary Care and Neurological Surgery, U.T. Medical Center, respectively, 'opined that [Husband] was unable to perform work activities.' " Husband cites to Volume 2 of the record, but there is only one volume. He also cites to an "Exhibit I." There is an "Exhibit I" in the record but it is simply a transmittal letter for the SSA decision. No medical records are a part of this appeal although Husband claims he relies on records supplied to the court through the years.

Wife relied on the SSA decision to show Husband's ability to work and pay his child support obligation. The decision was "unfavorable" to Husband, and he claims that the trial court erred in admitting the decision. Husband, however, relies heavily on the document to support his claims of physical and mental impairment.

Summarizing the SSA decision, Husband's brief states:

> Dr. Kenny, who performed a SSA consultative psychological evaluation of [Husband] diagnosed [him] with a depressive disorder and a personality disorder, not otherwise specified. [Husband] has "mild to moderate mental limitations except for marked limitations in the ability to understand and remember complex instructions; in the ability to make judgments in complex work-related decisions; to interact with the public; and to respond appropriately to usual work situations and changes in a routine work setting." An orthopedist, Dr. Bell, treated [Husband]. "An MRI showed [Husband has] cervical disc disease and herniation while physical examination showed no neurologic deficits and only cervical motion limitations." (Internal citations omitted.)
>
> Dr. Reid "examined [Husband] and recommended neck surgery that might or might not improve his complaints of pain that appeared to be associated with muscle spasms as well as nerve root compression. Subsequent to his C3-4 and C4-5 laminectomy and foraminotomy [on 6/21/2005], [Husband] continued to complain of right trapezius pain that he averred prevented him from performing yard work as well as his normal work activities. In November 2005, Dr. Reid opined that [Husband] had reached a maximum medical improvement and limited

him to lifting 25 pounds with avoidance of heavy equipment operation over rough terrain." Appellant had continued complaints of pain. (Internal citations omitted.)

The SSA Court found that [Husband] did not engage in substantial gainful activity and had "the following severe impairments: anxiety and/or depression which precludes dealing with the public and results in marked limits in adaption; gastroesophageal reflux disorder (GERD), generally controlled by medication; history of cervical laminectomy in 2005 with right arm and shoulder pain and left arm and shoulder pain due to rotator cuff surgery in the early 1990s . . . ." The "foregoing impairments are considered severe, individually and in combination, in that they place restrictions on the claimant's ability to engage in work activity. . . ." That Court found that [Husband] should avoid hazards and strong vibration; that he can stand/walk for one hour at a time and sit one hour at a time and requires a sit/stand option; that due to pain and/or sedation from medications, [Husband] cannot perform complex or highly detailed work and avoid constant reaching (Husband cannot lift his hands over his shoulder height.) (Internal citations omitted.)

[Husband] has testified that he attended school through the ninth grade in special education classes and remains unable to read or write, but can add and subtract and make change. He has no drivers license. [Husband] has worked as a concrete finisher since the age of 17 for a family business. (Internal citations omitted.)

The SSA Court . . . determined that even though [Husband] suffered from severe impairments, [Husband] did not suffer from as much pain as he claimed. That court stated: "The undersigned is very sympathetic to this nice fellow's financial crisis but regrettably is not convinced that he is disabled. The degree of the [Husband's] pain is not considered fully credible." (Internal citations omitted.)

A SSA vocational expert opined that, within the parameters outlined by the SSA Court, there were 14,650 jobs available for [Husband].

II.

The issues presented are:

> Whether the trial court erred in admitting and using information in the SSA decision and its conclusion as a basis for determining that [Husband] was in contempt of the trial court's order regarding child support.
>
> Whether the trial court erred in failing to make a finding of fact that [Husband] had the present ability to make the court-ordered payments when he was held in contempt.
>
> Whether the trial court erred in failing to make a finding of fact that [Husband's] failure to pay was willful.
>
> Whether the trial court erred in failing to decide [Husband's] petition to modify the child support order.

III.

In a non-jury case such as this one, our review is *de novo* upon the record of the proceedings before us; but the record comes to us with a presumption of the correctness as to the trial court's factual findings; a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no such presumption. ***Campbell v. Fla. Steel Corp***., 919 S.W.2d 26, 35 (Tenn. 1996) (citation omitted); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993) (citation omitted). We review a trial court's decision to impose contempt sanctions using an abuse of discretion standard. ***McDowell v. McDowell***, No. M2000-00164-COA-R3-CV, 2001 WL 459101, at *5 (Tenn. Ct. App. M.S., filed May 2, 2001) (citations omitted).

IV.

A.

Husband argues that the trial court erred in "using the [SSA decision] finding that [he] was not disabled for purposes of deciding whether to grant social security benefits to [him] as *the* basis for determining that [he] was in contempt of the trial court's order regarding child support." The order of the court, however, states that the court's decision is "based on the evidence and testimony received and the record as a whole . . . ." Nothing suggests that the SSA decision was "*the*" basis for the court's determination to hold Husband in contempt. Furthermore, during oral argument, Husband's counsel stated that the SSA decision was admitted without a contemporaneous objection being made. Such a failure constitutes a waiver of the issue for purposes of appeal. Tenn. R. Evid. 103(a)(1). Thus, the admission of the decision was not error, and the trial court properly relied upon the information in the decision, including its conclusion.

B.

The court found an arrearage in child support in the amount of $16,496,20 as of February 25, 2008. The court also ordered that "beginning on his release from jail, and each subsequent week thereafter, [Husband] shall pay the amount of $100.00 per [week] . . . ." Nothing in the record suggests that Husband contests that he owes back child support, that he owed it in the specific amount stated in the court's order or that he appeals that particular part of the trial court's decision.

Rather, Husband contests the finding of civil contempt. The trial court found that "based on the evidence and testimony received and the record as a whole, that: [Husband] is in civil contempt of court for failing to pay his child support." The court also held: "That, as punishment for said contempt, [Husband] shall be sentenced to confinement in the Blount County Jail until such time as he purges himself of contempt. [Husband] may have until noon on March 18, 2008 to report to jail at that time unless he comes up with a lump sum payment in the approximate range of [$2,000]."

Civil contempt, unlike criminal contempt, is designed to coerce an individual to comply with the order of a court. ***Doe v. Bd. of Prof'l Responsibility***, 104 S.W.3d 465, 473 (Tenn. 2003); ***Huggins v. Huggins***, No. M2002-02072-COA-R3-CV, 2005 WL 229848, at *2 (Tenn. Ct. App. M.S., filed January 31, 2005). As this court stated in ***Huggins***:

> Thus, before sentencing an individual to jail for civil contempt for failure to make payments required by a previous court order, the trial court must affirmatively find that the individual has the present ability to make the required payments.

Id. *(citing* ***Loy v. Loy,*** 32 Tenn. App. 470, 479-80, 222 S.W.2d 873, 877-78 (1949)); *see also* ***Smith v. Smith***, No. M2001-02231-COA-R3-CV, 2003 WL 21230980, at *3 (Tenn. Ct. App. M.S., filed May 29, 2003).

In ***Leonard v. Leonard***, 207 Tenn. 609, 619-20, 341 S.W.2d 740, 745 (Tenn. 1960), the Supreme Court limited the efficacy of a line of cases dealing with contempt. Those cases had held that the *face* of a contempt decree had to state the obligor had the ability to purge himself in the manner decreed by the court. *See* ***Hollabaugh v. Hollabaugh***, 1987 WL 11647, at *4 (Tenn. Ct. App. W.S., filed June 3, 1987) (discussion of ***Leonard*** holding). The Supreme Court held in ***Leonard*** that the decree of contempt was not void because of its failure to expressly state on its face that the obligor had the ability to comply with the decree but had willfully refused to pay the amount in arrears. Rather, the Supreme Court remanded the case so that the trial court could exercise its "sound judicial discretion" concerning whether the husband could pay and whether the payments should be reduced. ***Leonard,*** 207 Tenn. at 619-20, 341 S.W.2d at 745.

In ***Netherton v. Netherton***, we noted the fine distinction of the decision in ***Leonard***, saying, "Our Supreme Court has stated that the face of a contempt decree *or the findings of fact* must contain a finding that the party found in contempt for failure to pay support has the ability to purge himself

of the contempt by making the delinquent payments." ***Netherton v. Netherton***, No. 01A02-9208-PB-00323, at *3 (Tenn. Ct. App. M.S., filed February 26, 1993) (citing ***Leonard,*** 341 S.W.2d at 745). (Emphasis added.)

The trial court's order in the instant case does not contain on its face a statement that Husband had the ability, at the time the contempt order was entered, to pay the purge amount; nor is there a finding of fact to that effect. We thus remand for the trial court to make a determination whether Husband had the ability to purge himself of the contempt by making the required $2,000 or so payment.

C.

Husband argues that the trial court erred in failing to make a finding of fact that Husband willfully refused to pay the child support. For the reasons set out concerning the requirement of a finding that a party has the ability to purge himself of the contempt by making the delinquent payments and relying on the same authorities, we remand for the trial court to make a determination whether Husband's failure to pay the court-ordered child support was willful.

D.

Husband argues that the trial court should have decided a "Petition to Modify Child Support" that was filed prior to the hearing on the petition for contempt. In the petition, Husband sought modification on the following facts and circumstances: "Due to neck injury 2 disc in neck deteriorating." The children for whom support was sought to modify were born on September 19, 1989, and February 1, 1991. In his brief in this court, Husband argues that he is unable to work due to his medical conditions. He relies on the SSA decision for support and says there should be "a significant variance in income based on his diminished ability [to] earn and need for vocational rehabilitation."

It is well settled, however, that the existence of grounds for modification is not a defense to a petition for contempt. ***State ex rel. Whitfield v. Honeycutt***, No. M1999-00914-COA-R3-CV, 2001 WL 134597, at *3 (Tenn. Ct. App. M.S., filed February 16, 2001) (citation omitted). Thus, to the extent Husband is arguing that the trial court should have considered his petition to modify as a defense to the petition for contempt, we disagree. But we hold that the court erred in not ruling on the petition to modify child support.

The modification of child support obligations is governed by Tenn. Code Ann. § 36-5-101(g) (2006). ***Wine v. Wine***, 245 S.W.3d 389, 393 (Tenn. Ct. App. 2007) (citation omitted). Since 1994, the first inquiry has been " 'whether there is a 'significant variance' between the current obligation and the obligation set by the Guidelines.' " ***Id***. at 394 (citations omitted). The parent seeking the modification has the burden of proof. ***Id.*** (citing ***Turner v. Turner,*** 919 S.W.2d 340, 345 (Tenn. Ct. App. 1995)).

Even though a significant variance is proven, the court may nonetheless deny a petition to modify if the variance is the result of willful or voluntary underemployment. The burden of proving that a significant variance is the result of willful or voluntary underemployment is on the party opposing the modification. ***Id***. (citing ***Demers v. Demers***, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003); ***Richardson v. Spanos***, 189 S.W.3d 720, 727 (Tenn. Ct. App. 2005)). Thus, once a party satisfies the burden of proof that a significant variance exists, the burden shifts to the opposing parent to show that the variance is the result of willful or voluntary underemployment. ***Id***. (citing ***Demers***, 149 S.W.3d at 69; ***Richardson***, 189 S.W.3d at 727)). In addition to the other bases for the remand in this case, we send this case back to the trial court to address Husband's petition for modification.

V.

We affirm the trial court's judgment with respect to its finding of an arrearage of $16,496.20. We vacate the remainder of the trial court's judgment. This case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to the State of Tennessee.

_____

CHARLES D. SUSANO, JR., JUDGE